Nos. 91-543; 91-558; 91-563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER THE COUNTY OF CORTLAND, NEW YORK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Petitioner the County of Cortland, New York ("Cortland County") respectfully submits this Reply Brief in response to the briefs of the federal and state respondents (collectively, the

"Respondents") and the briefs *amicus curiae* in support of the Respondents submitted by the Rocky Mountain Low-Level Radioactive Waste Compact, *et al.* (the "Sited Compacts"); the American College of Nuclear Physicians, *et al.* (the "Waste Generators"); the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"); and U.S. Ecology, Inc. (collectively, the "*Amici*"). For the reasons set forth below, this Court should reject the arguments of the Respondents and *Amici* and determine that the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPAA"), 42 U.S.C. §§ 2021b-2021j, violates constitutional principles of federalism.

STATEMENT OF THE CASE

The Respondents and *Amici* would have this Court believe that if it declares LLRWPAA unconstitutional and void, the entire compact system will disintegrate, current low-level radioactive waste ("LLRW") disposal facility development will screech to a halt, New York will attempt to force its LLRW on other states, and the nation will be deprived of needed biomedical activities generating LLRW. As is explained below, there is no reason to predict any of these dire consequences from the Court's invalidation of the statute.

Cortland County is not asking this Court to invalidate the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, title II, 99 Stat. 1859, or the other statutes in which Congress approved interstate compacts for the disposal of LLRW. To the extent that Congress's consent to those compacts is granted subject to the provisions of LLRWPAA, and would be upset by the invalidation of that statute, Congress could reratify the basic provisions of those compacts — including the right to exclude extra-regional waste — without attaching that condition. The compacts would then have an incentive to continue the operation of current facilities and the development of new ones, as now planned.

In addition, New York has no intention of dumping its LLRW on unconsenting states if LLRWPAA is held unconstitutional. In meeting the statute's 1990 milestone, New York certified that it "will be capable of providing for, and will provide for, the

storage, disposal, or management of any low-level radioactive waste generated within [the state] and requiring disposal after December 31, 1992." 42 U.S.C. § 2021e(e)(1)(C). As the federal respondents admit, *see* Brief for the United States ("U.S. Br.") at 13 n.25, "in January 1991, New York formally assured the sited States that its wastes would not become an involuntary burden on them."

Finally, even if LLRW disposal facility development slowed while Congress amended LLRWPAA to conform to constitutional requirements, LLRW generators would not be forced to suspend waste-generating activities. LLRW that is not disposed of in existing facilities can safely be stored for extended periods of time. *See* Joint Appendix ("J.A.") 55a-58a. The Nuclear Regulatory Commission ("NRC") has determined that even high-level radioactive waste can feasibly be stored for at least 100 years with no significant environmental impact.[1] *See* 55 Fed. Reg. 38474, 38510 (Sept. 18, 1990) (Waste Confidence Decision Review). The LLRW generated by nuclear power plants thus could also practicably be stored on-site. *See* J.A. 55a-58a. In addition, major portions of Class A medical and academic waste (*e.g.* animal carcasses) could be reduced in volume by approximately 99 percent by incineration, and the resulting small quantity of ash could be stored temporarily on-site.[2] *See* J.A. 56a. The calamitous repercussions predicted by the Respondents and *Amici* as the inevitable result of invalidating LLRWPAA are thus illusory.

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[1] This determination confirms that the NRC's consistent opposition to storage of LLRW is based not on considerations of practicality, safety, or environmental protection but instead on its desire to enforce LLRWPAA. *See* J.A. 70a. That desire is manifest in the NRC's current consideration of a rule that would require LLRW generators to ask the states to take title to LLRW after 1995, even if they were not otherwise so inclined, as a condition to receiving NRC approval for storing such waste on-site after December 31, 1995. *See* U.S. NRC Secy-90-318, Low-Level Radioactive Waste Policy Amendments Act Title Transfer and Possession Provisions (Sept. 12, 1990).

[2] Class A waste accounts for 97 percent, by volume, of all the LLRW for which the states are required to provide disposal capacity under LLRWPAA. *See* Brief of U.S. Ecology at 5. By radioactivity, the vast majority of LLRW is Class C waste generated primarily by nuclear power plants. *See* J.A. 50a-51a.

ARGUMENT

POINT I

THE OBLIGATION IMPOSED ON THE STATES TO PROVIDE FOR LLRW DISPOSAL IS THE PROPER SUBJECT OF THIS COURT'S REVIEW

The Respondents and *Amici* attempt to persuade this Court that LLRWPAA's unprecedented direct commands to the states are nothing out of the ordinary.[3] To this end, the federal respondents and the Sited Compacts deny that LLRWPAA imposes upon the states an obligation to provide for LLRW disposal and ask the Court to examine in isolation only the enforcement provisions of the statute. *See, e.g.*, U.S. Br. at 21-22; Brief *Amici Curiae* of Sited Compacts in Support of Respondents ("Sited Compacts' Br.") at 10. As is explained below, this approach disregards the plain language of the statute and is inconsistent with fundamental principles of statutory construction.

A. *The Plain Language of the Statute Imposes an Affirmative Obligation on the States to Provide for LLRW Disposal*

"[S]tatutory interpretation begins with the language of the statute itself." *See Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990). Congress may generally be presumed to express its purpose through the ordinary meaning of the words it uses. *See Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Thus, absent clearly expressed legislative intent to the contrary, the plain language must ordinarily be

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[3] For example, the LLRW disposal problem is treated as a routine matter of land use regulation. *See* Brief of Respondents, States of Washington, Nevada and South Carolina at 24; Brief *Amici Curiae* of Sited Compacts in Support of Respondents at 24. This suggestion is absurd in view of the states' complete lack of authority to regulate LLRW for the protection of their citizens against radiation hazards. *See Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205-16 (1983).

regarded as conclusive. *See Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). As is explained below, the plain language of LLRWPAA imposes affirmative obligations upon the states.

LLRWPAA sets forth unambiguously the states' responsibilities for disposal of LLRW. The statute provides in pertinent part:

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of – (A) low-level radioactive waste generated within the State . . .; (B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except [for three categories of LLRW] . . . .

42 U.S.C. § 2021c(a)(1). Even in isolation from the remainder of the statute, the plain language of this provision creates an inescapable obligation: The states, and the states alone, are required to provide for the disposal of all LLRW generated privately, by the states, or, in some cases, by the federal government itself.

The Sited Compacts would have this Court interpret the mandate of section 2021c(a)(1) merely as a "statement of policy, which was borrowed from the original 1980 Act." Sited Compacts' Br. at 19. The policy statement in the Low-Level Radioactive Waste Policy Act of 1980 (the "LLRW Policy Act") differs crucially, however, from the direct order issued in section 2021c(a)(1) of LLRWPAA. In the LLRW Policy Act, Congress declared the "*policy* of the Federal Government that – (A) each State is responsible for providing for the . . . disposal of low-level radioactive waste generated within its borders . . . ." Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348 (emphasis added). When Congress enacted LLRWPAA, however, it chose to eliminate the description of this responsibility as a mere "policy" and decreed instead that "[e]ach State *shall be* responsible" for LLRW disposal. 42 U.S.C. § 2021c(a)(1) (emphasis added).

The essential difference between the provisions of the original and the amended statute should not be ignored when interpreting LLRWPAA. Rather, this Court should "give effect to the subtleties of language that Congress chose to employ," where, as here, Congress amended specific sections of a statute. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986).[4] Where language limiting the effect of a federal statute is intentionally deleted, this Court may presume that Congress intended to eliminate the limitation. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983). The statement that the states "shall be responsible" for LLRW disposal should thus be read consistently with its ordinary meaning to "strengthen[] the 1980 Act," Brief of the AFL-CIO as *Amicus Curiae* in Support of Respondents ("AFL-CIO Br.") at 15 n.35, by transforming merely hortatory language into a direct affirmative command to the states.[5]

In addition to the plain language and legislative history of section 2021c(a)(1), this Court should consider the structure of LLRWPAA as a whole in determining the meaning of that provision. *See United States v. Morton*, 467 U.S. 822, 828 (1984). Examination of that structure reveals that LLRWPAA includes a series of penalties designed to compel compliance with Congress's basic mandate to the states. *See* 42 U.S.C. §§ 2021e(d)(2)(C) (the "Take Title Provision"); 2021e(e)(2) (authorizing surcharges and denial of access to existing LLRW disposal facilities as "[p]enalties for failure to comply"). Most significantly, the Take Title Provision directly punishes states that fail to comply with their obligation to provide for LLRW disposal by 1996 by compelling those states to take title to all LLRW offered to them by in-state generators and either to take possession of that

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[4] *See Immigration and Naturalization Service v. Hector*, 479 U.S. 85, 90 n.6 (1986) (noting that the plain language of a statute carries additional weight when the language has been the subject of amendment).

[5] The Sited Compacts thus miss the point of the petitioners' claim in arguing that "[t]his Court has never based its federalism decisions on the presence or absence of words like 'shall' in a challenged federal statute." Sited Compacts' Br. at 19. The basis of the petitioners' complaint is not Congress's usage of the word "shall" but its attempt to impose inescapable obligations on states that would prefer to remain inactive in the LLRW disposal field.

waste or to assume liability for all damages arising out of their failure to take possession. The imposition of such a "far-reaching, difficult, and punitive" measure, 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston), confirms that section 2021c(a)(1) should be read not merely to declare federal policy but to impose an affirmative obligation on the states.

B. *The Federal Respondents' Focus on Unchallenged Enforcement Provisions Is Misplaced*

The federal defendants provide no defense of the fundamental obligation imposed on the states to provide for LLRW disposal.[6] They instead attempt to divert this Court's attention from the obligation – which properly constitutes the core of this case – by treating certain incentives and penalties provided under LLRWPAA (and not separately challenged by the petitioners) as if they were the "basic provisions" subject to this Court's review.[7] U.S. Br. at 21-25; *see* Sited Compacts' Br. at 10, 21. By defending those enforcement measures in isolation from the states' fundamental obligation to provide for LLRW disposal, the federal respondents effectively argue that lawful means should justify an unconstitutional end. Their argument should be rejected for the reasons set forth below.

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[6] In the guise of defending the Take Title Provision, the federal respondents effectively acknowledge the state's obligation to provide for LLRW disposal and seek to justify it by arguing that "States can meet the responsibility imposed by the Act" in a variety of different ways. U.S. Br. at 34. The range of state discretion as to *how* to comply with LLRWPAA is irrelevant here, however, where the petitioners challenge Congress's authority to deprive the states of the choice *whether* to take responsibility for LLRW disposal. By usurping that decisionmaking authority, Congress fails the "aggrandizement test" for consistency with constitutional principles of federalism described in the Sited Compacts' Br. at 13.

[7] The federal respondents do not include the Take Title Provision – the only penalty provision that is directly subject to challenge in this action – among the "basic provisions" of the statute. Cortland County discusses the arguments of the Respondents and *Amici* in defense of the Take Title Provision in Point III below.

1. *LLRWPAA Does Not Condition Receipt of Federal Grants upon Compliance with Federal Regulations*

The federal respondents first argue that the payments authorized pursuant to 42 U.S.C. § 2021e(d)(2)(B)(i)-(iv) as financial incentives for reaching certain milestones are lawful as an exercise of congressional spending power. *See* U.S. Br. at 22-23. LLRWPAA is not, however, an exercise of that power.

Contrary to the misleading suggestion of the federal respondents, *see id.* at 12, 22-23, Congress has appropriated no federal funds whatsoever for direct aid to the states – conditional or otherwise. The so-called "federal payments to the States," *id.* at 12; *see id.* at 26, are merely rebates of surcharges paid by LLRW generators and held in escrow by the Secretary of Energy. *See* 42 U.S.C. § 2021e(d)(1), (2)(A)-(B). Congress's alleged authority to enact LLRWPAA must therefore be found, if at all, in the Commerce Clause. The federal respondents' analysis of the rebates as an exercise of the spending power, *see* U.S. Br. at 22-23, is entirely irrelevant and obfuscates the real issue here.

Moreover, unlike the states subject to regulation in the conditional funding cases, *see, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding funding conditioned upon adoption of a minimum drinking age of 21 years), which could avoid compliance with federal requirements by refusing the conditioned federal grants, *see Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), New York cannot escape its responsibility to provide for LLRW disposal simply by choosing to decline the rebates provided under LLRWPAA.[8] Because the fundamental obligation to provide for such disposal persists irrespective of New York's choices, that obligation is far more intrusive

[8] The rebates in fact do not serve to enforce the basic obligation directly but merely operate as an incentive to meet certain statutory milestones that constitute steps in the process of developing disposal capacity. Even if the states choose not to meet the milestones, they cannot escape the basic obligation to provide for LLRW disposal.

upon state sovereignty than any statutory requirement upheld as an exercise of congressional spending power. Indeed, as Cortland County shows in its main brief and in Point II below, Congress exceeded its authority under the Commerce Clause in imposing that obligation.

2. *Congress's Power to Authorize State Discrimination Against Interstate Commerce Has No Bearing on the Central Issue of This Case*

The federal respondents also defend the constitutionality of sections 2021e(d)(1) and 2021e(e)(1)-(2) of LLRWPAA, which authorize host states in sited compacts to discriminate against LLRW generated outside the compact region. *See* U.S. Br. at 24-25. Congress's power to authorize states to take action that would otherwise be impermissible as an interference with interstate commerce is not, however, the subject of this action. The question presented by the instant challenge of LLRWPAA is whether the end that Congress is pursuing through the use of that lawful means – exclusive state responsibility for LLRW disposal – comports with constitutional requirements. The "commonplace form of *most* of the Act's provisions," U.S. Br. at 21 (emphasis added), is irrelevant where the obligations subject to challenge are unprecedented and unconstitutional. If this Court finds, as it should, that the ultimate responsibility imposed upon the states in LLRWPAA is inconsistent with fundamental principles of federalism, the statute must be declared unlawful and void.

POINT II

LLRWPAA IS INCONSISTENT WITH PRINCIPLES OF FEDERALISM

The Respondents attempt to defend the constitutionality of LLRWPAA by arguing that it does not seriously intrude upon state sovereignty. Toward this end, they argue that the statute was the least restrictive alternative available to Congress to solve the national LLRW disposal problem. They also treat the statute enacted by Congress as if it were merely a contract among the states. As is explained below, these arguments rest upon false dichotomies and inappropriate analogies.

A. *In Enacting LLRWPAA, Congress Rejected Less Restrictive and Unquestionably Constitutional Legislative Alternatives*

The federal respondents and *Amici* would have this Court believe that there were only two options available in 1985 to avert the potential shortage of LLRW disposal capacity: Either Congress could enact LLRWPAA or Congress could preempt the states' authority altogether and impose a federal solution. *See* U.S. Br. at 37-38; Sited Compacts' Br. at 15, 16; Brief of Waste Generators at 21-22; AFL-CIO Br. at 19; Brief of U.S. Ecology at 15. Although it should not be assumed that preemption is necessarily the more intrusive option, *see Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 786-87 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part), the national LLRW disposal problem did not present Congress with such a limited choice. Congress could have effectively – and constitutionally – addressed the problem if it had retained federal responsibility for LLRW disposal when the states chose not to administer a disposal program and had provided federal financial aid to the states.

These less restrictive alternatives, which had been successfully employed in prior environmental statutes, *see, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*,[9] would have promoted congressional accountability by requiring that the federal government bear some of the costs of its LLRW disposal policy. These alternatives would also have better reflected the LLRW disposal recommendations of the National Governors Association ("NGA"), which provided that the states "*should accept* primary responsibility" for LLRW disposal,[10] J.A. 114a (emphasis added),

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[9] Section 1342(b) of the Clean Water Act authorizes, but does not require, state administration of the permit system for discharge of pollutants. Sections 1259, 1285(c), 1329(h), and 1381 establish federal grants for training programs, waste treatment works, management programs, and state water pollution control revolving funds.

[10] The unmistakably hortatory character of this language contrasts sharply with LLRWPAA, which provides that the states "shall be responsible." 42 U.S.C. § 2021c(a)(1).

and called for federal funding of state LLRW disposal planning activities, *see* J.A. 130a-33a. Thus, had it chosen to do so, Congress could have solved the LLRW disposal problem consistently with the states' preferences without shifting the entire responsibility to the states.[11]

The real choice presented to Congress was thus whether to retain accountability for its actions or to structure LLRWPAA to ensure that state officials alone bore the political burdens of federally mandated LLRW disposal programs. Had Congress provided for *voluntary* state responsibility, citizens of states that chose to administer their own programs could properly have held state officials accountable, whereas citizens of states that chose to deploy their resources elsewhere could have held federal officials responsible for the administration of LLRW disposal programs. State voters could also appropriately have held state officials accountable for the choice whether or not to accept responsibility for such programs. Such genuinely cooperative federal and state implementation of LLRW disposal policy would have promoted the values of governmental responsiveness and democratic participation, *see* U.S. Br. at 38, far better than LLRWPAA, which mandates that the LLRW problem "be worked out *entirely* by the States," Sited Compacts' Br. at 14, and thus blurs the lines of political accountability.[12]

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[11] Neither the Respondents nor the *Amici* suggest that the federal government has an interest in avoiding responsibility for LLRW disposal. Congress's only legitimate goal in enacting LLRWPAA was to remedy the perceived shortage of disposal facilities. Because that purpose could have been achieved without imposing inescapable obligations on the states, the federal interest in enforcing LLRWPAA's affirmative mandate cannot override the states' interest in protecting their sovereignty.

[12] In view of "the federal government's refusal to enter the field," Sited Compacts' Br. at 19, the insinuation that the *states* were asking Congress to allow them to dodge responsibility for their own actions, *see* U.S. Br. at 38, lies ill in the mouth of the federal respondents.

B. *LLRWPAA Cannot Properly Be Regarded as a Compact Among the States*

The Respondents and *Amici* also attempt to evade the constitutional implications of a federal statute that imposes inescapable affirmative obligations on the states by treating LLRWPAA as if it were itself, or implemented, a 50-state compact. *See* U.S. Br. at 38; Brief of Respondents, States of Washington, Nevada and South Carolina ("Sited States' Br.") at 2, 8, 10, 13, 15; Sited Compacts' Br. at 16-17; Brief of Waste Generators at 21-22. The metaphor is inapt for three reasons.

First, LLRWPAA cannot be read as a compact among the states.[13] Prior to its enactment, LLRWPAA did not receive formal approval by the states, whether by state legislative enactment or by referendum.[14] Nor did Congress merely ratify terms drafted and expressly affirmed by the states when it enacted that statute. At best, LLRWPAA represents selective congressional endorsement of recommendations offered by a lobbying group for the states.

Second, the compact analogy is inappropriate not only because LLRWPAA lacks the legal indicia of a formal interstate compact but also because Congress substantially altered the terms of the NGA's recommendations when it enacted LLRWPAA. Instead of retaining partial administrative and financial responsibility for LLRW disposal, as the NGA suggested, Congress transferred that responsibility exclusively to the states, thereby relieving itself altogether of the burdens associated with a politically unpopular program.

Third, even if LLRWPAA could be construed as some sort of agreement among the states, New York is not, contrary to

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[13] The structure and substance of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, title II, 99 Stat. 1859, which is an example of a statute approving interstate compacts, contrasts sharply with that of LLRWPAA.

[14] Thus, contrary to the suggestion of the sited states, *see* Sited States' Br. at 17 n.27, the states, as sovereigns, did not consent to the statutory provisions challenged here.

the Respondents' insinuation, *see* U.S. Br. at 38; Sited States' Br. at 23-25, attempting to reap the benefits of its bargain without assuming the burdens.[15] New York has accepted the burdens of complying with the statute, albeit unwillingly, by taking the actions required to meet the 1986, 1988, and 1990 milestones.[16] Moreover, as is explained above, New York will be fully capable of managing its own LLRW at the end of this year. The attempt to portray the instant challenge as an effort to foist the LLRW generated in New York on unconsenting states is therefore unfounded.

POINT III

CONGRESS EXCEEDED ITS AUTHORITY IN ENACTING THE TAKE TITLE PROVISION

By according the Take Title Provision separate attention in their briefs, the Respondents implicitly recognize the unique character of that provision and the grave constitutional questions it presents. As is explained below, those questions remain unanswered by the defenses of the Take Title Provision offered by the Respondents and *Amici*.

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[15] Indeed, New York has already accepted and continues to bear more than its share of the burdens of LLRW disposal. New York permitted LLRW to be disposed of at West Valley for 12 years, until radioactive contamination forced closure of the facility. New York has spent substantial sums just to maintain the site, and full cleanup costs have yet to be determined. *See* J.A. 65a. Thus, even if New York were now seeking to export all of the LLRW generated within its borders, its position would differ little from that of the State of Nevada, which hosts a facility that is scheduled to close at the end of the year and plans thereafter to ship its LLRW out-of-state.

[16] As the record reflects, the penalties set forth in LLRWPAA provided the impetus for New York's compliance with its mandates. *See* J.A. 80a-81a. The decision to respect the law, by complying with LLRWPAA's terms while contesting its constitutionality, cannot be construed as consent to the provisions challenged here.

A. *The Federal Respondents Ignore the Substance of the Take Title Provision*

Whereas the federal respondents sought (unnecessarily) to defend the incentives and penalties other than the Take Title Provision by analyzing Congress's power to confer conditional grants and to authorize discrimination against interstate commerce, *see* U.S. Br. at 21-25, their defense of the Take Title Provision ignores Congress's attempt to compel the states to assume ownership of dangerous radioactive waste and liability for any damages arising out of their failure to take possession of it.[17] The federal respondents seek to temper the extremity of that provision by arguing that the states can simply avoid the punishment it effects.[18] *See id.* at 33-36. Such an argument is like claiming that the death penalty is not a grievous punishment because a person can avoid committing capital crimes. This Court should not so easily be diverted from consideration of the substance of the Take Title Provision.[19]

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[17] The federal defendants instead focus on the constitutionality of the obligation enforced by the Take Title Provision – compelling the states to provide for LLRW disposal – which is addressed in Point II above and in Points II and III of Cortland County's main brief.

[18] New York cannot so easily avoid application of the Take Title Provision. The ostensible options of entering a compact or contracting with a sited compact for disposal of New York's LLRW, *see* U.S. Br. at 34, are not necessarily available to New York. Such agreements require the acquiescence of other sovereign states, which New York cannot compel. Nor can New York leave LLRW disposal entirely to market forces and leave facility regulation to the NRC. The development of 14 LLRW disposal facilities, as is currently contemplated, *see id.* at 10 n.19, makes the private development of a disposal facility in New York economically infeasible. *See* J.A. 53a. Thus, notwithstanding New York's ability to provide for storage or other management of LLRW generated within its borders, unless the State is able to select a disposal method, locate a facility site, construct the facility, and obtain NRC licensing by 1996 – none of which have yet been accomplished – the State will be subject to the full punitive force of the Take Title Provision.

[19] Similarly, this Court should not be misled by the federal respondents' belated claim that the petitioners' challenge of the Take Title Provision is not ripe for review. The likelihood that New York will be able to complete the full range

(Footnote continued)

To the extent that the *Amici* address the substance of the Take Title Provision, their defenses are inadequate. Contrary to the Waste Generators' claim, *see* Brief of Waste Generators at 25, the Take Title Provision does not merely impose a financial burden upon the states. The Take Title Provision prevents New York from requiring LLRW generators to make arrangements for the disposal of their own waste, *see* AFL-CIO Br. at 18, or conditioning the generation of such waste on the availability of disposal facilities.

B. *There Is No Precedent for the Take Title Provision*

The federal respondents attempt to defend the Take Title Provision by arguing that other federal directives to the states have been found constitutional. *See* U.S. Br. at 30-32. The two cases cited as alleged authority for statutory commands to state legislatures and executive officials, *see Puerto Rico v. Branstad*, 483 U.S. 219 (1987); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), were not, however, decided pursuant to the Commerce Clause. Similarly, having cited no authority for their claim that the Commerce Clause entitles Congress to perform the dispute-resolution function allocated to this Court under Article III, section 2 of the Constitution, *see* U.S. Br. at 32, the federal respondents cannot justify Congress's actions in enacting the Take Title Provision by appeal to this Court's alleged orders to state officials. *See* U.S. Br. at 31-32 and cases cited there-in.[20] Finally, this Court has never held that the commerce power authorizes

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of activities required to put a disposal facility into operation by 1996, *see supra* note 18, is small indeed. Moreover, in moving for summary judgment, the federal respondents declined to raise that claim, which rests upon disputed issues of fact that cannot be decided upon the present record.

[20] The federal respondents attempt to equate this Court's adjudication of resource allocation conflicts, *see Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *Wyoming v. Colorado*, 309 U.S. 572 (1940), or interstate nuisance actions, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Missouri v. Illinois*, 200 U.S. 496 (1906), with the legislative resolution of conflicts among the states purportedly effected by LLRWPAA. *See* U.S. Br. at 32. Although the analogy has some superficial appeal when applied to the

(Footnote continued)

direct congressional commands punishing the states by compelling them to assume ownership of contaminated private property and has in fact repeatedly suggested that attempts to impose such inescapable obligations would exceed Congress's authority. *See* Cortland County's Petition for a Writ of Certiorari at 17-28, 34-45 and cases cited therein.

C. *Congress Avoided Political Accountability In Enacting the Take Title Provision*

The federal respondents effectively concede that if the process-based standard for compliance with the Tenth Amendment adumbrated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is interpreted merely to require an opportunity for states to participate in the federal legislative process, it is possible that such a "daunting standard" could never be met.[21] *See* U.S. Br. at 27. Because the practical impossibility of meeting the standard (so construed) leaves Congress completely unfettered by the affirmative limits on federal action imposed by the constitutional structure, *see Garcia*, 469 U.S. at 556, that interpretation should be rejected in favor of one that finds political protection for state sovereignty in congressional accountability for national policy. *See* Brief of Cortland County

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basic obligation imposed upon the states to provide for LLRW disposal, it has no bearing upon the Take Title Provision, which pits the states against in-state LLRW generators. Even as applied to the basic obligation, the analogy fails because LLRWPAA mandates neither the allocation of shared natural resources nor the remediation of out-of-state problems tortiously created by the shipment of LLRW.

[21] The Respondents nevertheless ask this Court to apply that standard. *See* U.S. Br. at 26-29; Sited States' Br. at 17-19. Even if it were applied, however, the Take Title Provision would fail to meet it. That provision was not part of the NGA's recommendations, and no state official had any opportunity to comment upon it prior to its "last minute" enactment. *See* Sited Compacts' Br. at 28. The mere fact that citizens of the states elect members of Congress – whose political interests are directly served by the statute – cannot be relied upon to protect the conflicting interests of the states any more than the fact that individuals elect members of Congress can be relied upon to protect the constitutional rights of individuals.

at 20-22. Because Congress structured the Take Title Provision to avoid such accountability,[22] *see id.* at 23-26; *see also* Point II(A) *supra*, the provision should be found unconstitutional and void.

[22] The Take Title Provision indisputably severs the interests of the states from those of private LLRW generators by relieving those generators of the liabilities ordinarily attendant upon ownership and possession of the waste and shifting them exclusively to the states. That Congress bears none of the financial or administrative costs of the Take Title Provision is also clear on its face. Thus, in enacting the Take Title Provision, Congress evaded both of the political checks that keep it accountable when it passes legislation that is intrusive upon state sovereignty. *See* Brief of Cortland County at 23-25.

CONCLUSION

For the reasons set forth herein, in Cortland County's main brief, and in its petition for a writ of certiorari, Cortland County respectfully requests that the decisions of the courts below be reversed and that LLRWPAA be declared unconstitutional and void in its entirety.

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